

THE RE-EVALUATION OF AMERICAN CITIZENSHIP

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Citizenship is very much on America's collective mind. Congress is busily redefining it. Intellectuals are writing books about it. Citizens are debating whether it has lost its meaning. Aliens are lining up to apply for it in unprecedented numbers. What, one may ask, is going on here?

Citizenship talk proceeds through several different tropes. Sometimes we advance it as a powerful aspirational ideal. In this normative usage, it serves as a proxy, or place-holder, for our deepest commitments to a common life. Citizens, in this view, mutually pledge their trust and concern for each other and their full participation in shared civic and civil cultures. Sometimes—perhaps even at the same time—we also deploy citizenship as a positive concept. In this positive usage, it describes a legal-political status that some individuals enjoy, some can only aspire to, and still others have little hope of ever attaining. Here, citizenship describes a relationship between individuals and the polity in which citizens owe allegiance to their polity—they must not betray it and may have to serve it—while the polity owes its citizens the fullest measure of protection that its law affords, including (except for minors and some convicted felons) the right to vote.

These two uses of citizenship—the normative and the positive—are linked rhetorically, and perhaps even psychologically. Like the serpents on a caduceus, they are tightly intertwined. We often use the ideal of citizenship as a standard against which to evaluate the actual conduct of others, hurling the ideal as an accusation, bitterly condemning what we do not like about contemporary life and ascribing it to the defects of our fellow citizens. Whether the offense is the despoilment of public spaces in our cities, the failure to vote in our elections, the violence in our schools and neighborhoods, or the erosion of our families, we indict not only the individual perpetrators but the polity that, by debasing citizenship, has fostered or at least countenanced these wrongs. At times—and today, seems such a time—our despair may be so great that we wonder whether we remain one people dedicated to common purposes. The most disillusioned of us may conclude

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that citizenship should be a privilege that requires us to be better in order to claim it, a prize that can be earned only through greater rectitude.

It is precisely at these censorious moments, however, that citizenship's positive meaning can check the harsh, exclusionary impulses that its normative meaning reflexively arouses in us. When we are tempted to say (or feel) that our fellow citizens should, "shape up or ship out," or should "love our country or leave it," we may recall that our law does not view citizenship as a reward for civic virtue. The target of criticism may respond with what he imagines is a rhetorical trump: "It's a free country." But far from silencing the critic, this reply simply invites a rebuttal in which he invokes his underlying conception of freedom—and of citizenship. So the conversation goes.

In the United States today, this conversation is particularly heated. Not since the McCarthy era in the early 1950s, when many Americans aggressively questioned the loyalty of their fellow citizens, relatively few immigrants were admitted, and relatively few of those sought to become citizens, has citizenship talk been so energetic and morally charged. In Congress, at the bar of public opinion, and even in the courts, citizenship in both its normative and positive dimensions is being closely re-examined. Indeed, Congress adopted welfare reform and immigration control laws in 1996 that were intended, among other goals, to increase sharply the value of American citizenship while reducing the value of permanent legal resident status. As of June 1997, moreover, some members of Congress were calling for legislation that would restrict the availability of naturalized citizenship, birthright, (*jus soli*) citizenship, and plural citizenship.

In this article, I explore the reasons why Americans are arguing more passionately about citizenship today, and why some of the rules that have long structured citizenship status are under vigorous assault. I shall argue that the intensity of this debate reflects the tensions that arise within and among three analytically distinct relational domains, each of which is characterized by a distinctive problematic, a wrenching conflict between competing and deeply held values.

The first domain is international law and politics. Here the nation defines the scope of its sovereignty by classifying all individuals as either insiders or outsiders. By insiders, I mean those whom the polity brings into its constitutional community by granting them legal rights against it. The American constitutional community includes citizens, legal resident aliens, and in some cases, illegal aliens. Outsiders are everybody else in the world. The United States defines its sovereignty in this international domain largely, but not exclusively, in terms of its power over territory; its constitutional community embraces virtually all individuals within its national borders and territories, as well as some who are outside them but to whom the United States has

acknowledged some special political and legal relationship. The distinctive problematic in this domain is a tension between the values of national sovereignty and autonomy and the reality that many outsiders possess the power to transform themselves into insiders without the nation's consent and beyond its effective control.

The second domain is national politics. Here, public law classifies the body of insiders into different categories, defining what the polity owes to each of them and what they in turn owe to the polity. Its distinctive problematic is a tension between the values of equal treatment and communal self-definition, and the reality of limited resources. This tension is particularly delicate because it encourages the marginalization not only of outsiders but of some insiders as well. The meaning of citizenship in the national political domain is highly controversial in the United States today because it is intimately connected to bitterly divisive questions about the welfare state—its essential legitimacy, its moral character, its purposes, its programmatic scope, and its availability to citizens and to various categories of aliens.

The third domain is federalism—the structural division of the American polity into multiple, overlapping sovereignties.¹ Each individual possesses a civic status in the national polity and in a state polity. She may also live in a private enclave in which her status is regulated, often extensively, by contract. Different rights and duties attach to these diverse statuses. Federalism's distinctive problematic is a tension between the values of equality and uniformity, which the nation can promote through its power to unify the same policy throughout its territory, and the value of diversity among, and responsiveness to, the policies advanced by different states and contractual regimes. In this domain, as in that of national politics, Americans are bitterly debating the meaning of citizenship in the most divisive of contexts: a fundamental reconsideration of the welfare state. In August 1996, the United States adopted a welfare reform law—forged through a remarkable bipartisan consensus—that constitutes perhaps the most far-reaching change in American social policy since the foundations of its welfare state were established during the New Deal. I discuss these reforms in a later section on citizenship in the federal system.

The article is divided into three parts, corresponding to these three domains of citizenship. In each, I discuss how changing conditions, ideas, and values have provoked a re-evaluation of American citizenship by deepening its characteristic tensions. Before concluding the article, I offer some brief and tentative observations on the notion, which has recently come into academic vogue, of what is commonly called “post-national citizenship.”

1. As I note *infra*, I mean to include in ‘sovereignties’ both public and private governance regimes to which individuals may be subjected.

CITIZENSHIP IN THE INTERNATIONAL DOMAIN

In dividing up the world's population into insiders and outsiders, the United States is remarkably inclusive, at least relative to other polities. This inclusiveness takes a number of different forms. First, the United States has adopted a very liberal legal immigration policy, admitting approximately 800,000 aliens each year (the precise number fluctuates considerably) for permanent residence.² This annual influx probably exceeds the legal admissions totals of the rest of the world combined. Moreover, the United States has increased its legal admissions during the 1990s, a period during which other countries have been restricting them. When Congress overhauled U.S. immigration laws in 1996, it resisted intense political pressures to reduce the number of legal admissions. Hence, the post-1990 growth in the legal immigration system remains in place. Second, the United States in the 1980s and early 1990s extended legal permanent resident status to nearly 2.7 million illegal aliens through a massive amnesty, a program to legalize illegal's dependants, and more conventional immigration remedies. Third, a combination of expansive *jus sanguinis* and *jus soli* rules extends citizenship very broadly—to essentially all individuals who are born on U.S. soil, regardless of their parents' legal status, all children born abroad to two American parents, and many children born abroad to one American parent. Fourth, U.S. naturalization requirements are relatively easy—indeed, some say, too easy—to satisfy. From 1990 to 1995 the United States naturalized between 240,000 and 488,000 aliens a year; in 1996 alone, more than one million individuals were naturalized, the largest cohort in history. Propelled by welfare law changes that restrict many benefits to citizens, further increases in petitions—up to an estimated 1.8 million in 1997—are expected.³ Fifth, dual (and even triple) citizenship is increasingly common, and the State Department no longer opposes it in principle.

Finally, more than one million aliens enter the United States illegally each year; some 250,000 to 300,000 of these individuals remain in illegal status more or less permanently, producing an illegal population now estimated at over 5 million. Simply by virtue of their presence in the United States, illegal immigrants can claim extensive procedural rights, and in some cases, substantive entitlements as well, under the Constitution, statutes, and administrative rules, although the 1996 amendments to the immigration statute severely limited some of these rights, especially for those who entered the United States illegally. Even excludable aliens stopped at the border, who possess only the most elementary constitutional rights, such as access to the courts and freedom from physical abuse, can claim many statutory rights under U.S. laws.

2. The number of legal immigrants actually admitted was 915,000 in 1996, 720,000 in 1995, 804,000 in 1994, and 904,000 in 1993.

3. The Immigration and Naturalization Service (I.N.S.) rejected 200,000 petitions in 1996; 965,000 petitions were pending in March 1997.

In the international arena, the principal force reshaping Americans' conceptions of citizenship is the growing anxiety aroused by their perception that their national sovereignty is under serious challenge. Three recent developments are particularly salient: the globalization of the U.S. economy; the increase in immigration, particularly illegal immigration; and a more general diminution of American autonomy in the world.

Globalization

The integration of the world economy—its “globalization,” in the already hackneyed phrase—has proceeded at an ever-quickenning pace. This integration, moreover, is comprehensive, encompassing all factors of production, distribution, and communication including goods, services, capital, technology, intellectual property rules, and (most pertinent for present purposes) labor. The U.S. economy, while primarily focused on its enormous domestic market,⁴ has in recent years become a nimble exporter and importer of capital and, to a lesser extent, of jobs. A number of factors strongly suggest that this trend will continue. Powerful economic and political interests are driving this trend, while enfeebled labor unions lack the bargaining-power to arrest, much less reverse, it. American producers, no longer able to count on policies protecting them from foreign competition, are rationalizing their operations by sending low-skill jobs abroad while importing high-skill technicians, managers, and professionals where needed.

Nowhere is the force of this globalization dynamic more apparent than in the formation of regional free trade blocs and their gradual extension—through the inclusion of new members, mergers with other such blocs, and coverage of additional goods and services. This dynamic first occurred in Europe with the progressive expansion of the Treaty of Rome, leading to the establishment of the European Union, which has grown to include much of the former European Free Trade Area as well as other new members and trade sectors. For the United States, of course, the crucial development has been the creation of the North American Free Trade Agreement (NAFTA), which is likely to be enlarged eventually to include Chile and perhaps other hemispheric nations, as well as being extended to include other areas of economic activity. Long before NAFTA, of course, the United States and Mexican governments had concluded a number of formal and informal arrangements involving economic activities in the border areas and the control of migration to the United States from South and Central America. NAFTA has altered and extended these arrangements, with consequences that will not be well understood for years to come.

4. The globalization phenomenon, while important, is easily exaggerated. According to a very recent study, U.S. based firms' share of world output outside the United States actually declined from 3 percent to 2 percent between 1977 and 1993, even as the domestic U.S. economy expanded. ROBERT LIPSEY ET. AL, INTERNATIONALIZED PRODUCTION IN WORLD OUTPUT, NBER WORKING PAPER NO. 5385 (1996).

For present purposes, the important point is that these developments signal a growing recognition by the U.S. government that America's fate is increasingly linked to that of her neighbors, her other trading partners, and the rest of the world. These linked fates are not merely economic but are also demographic, social, and political. The United States is increasingly vulnerable to the immense migratory pressures being generated by conditions beyond her borders and her control. These 'push' factors are magnified and reinforced by powerful, indeed tidal, 'pull' factors: a vast and burgeoning American economy that often prefers foreign workers to domestic ones, a dynamic American culture that promises immigrants great personal freedom and mobility, and grooved pathways of kinship-based chain migration that constantly creates and replenishes immigrant and ethnic communities in the United States.

Migration

Since 1965, immigration to the United States has been transformed in virtually every vital aspect.⁵ The legal immigration streams have swelled in both absolute terms and as a percentage of the overall population. Even more important than the size of those streams, the "look and feel" of American society has changed dramatically with the changing mix of the newcomers' national origins, races, and languages. All of this has occurred in a relatively short period of time, generating cultural, economic, and social anxieties among many Americans.

But it is *illegal* migration that is primarily driving the political dimension of this debate. The volume of illegal migration has grown fairly steadily during the last three decades except for the period immediately following the enactment of the employer sanctions provisions of the Immigration Reform and Control Act of 1986, when the number declined. This decline, however, proved to be brief; by 1990, the number of illegal immigrants in the United States had already returned approximately to its pre-1986 level; the permanent illegal population now exceeds 5 million. Even the growth in the resources devoted to border control during the last five years—extraordinary especially when compared to the retrenchment in other federal programs—shows no clear sign of stemming this influx (as opposed to re-channelling it). The continuing ineffectiveness of border control is a source of enormous frustration to Americans and their politicians, especially in the relatively small number of communities with high concentrations of illegals. At the same time, Americans have become more dependent on illegal workers and more aware of this dependence, which for many employers, consumers, and communities can approach an addiction. These competing feelings can produce hypocrisy of comical dimensions. California Governor Pete Wilson,

5. See Peter H. Schuck, *The Message of 187*, AM. PROSPECT 85-92 (1995).

for example, sought to build a political movement by denouncing illegal aliens, many of whom had been admitted earlier as temporary workers under a program that he had sponsored as a Senator, only to be caught employing them in his household and then failing to pay their social security benefits!

Because many Americans feel beleaguered and victimized by illegal immigration, it is profoundly affecting their political identity. These feelings are intensifying as the large number of former illegal aliens who received amnesty in the late 1980s begin to become U.S. citizens, many motivated by a desire to secure their access to welfare state benefits in the United States. Moreover, the families of these amnestied illegals are now exerting strong pressures on the *legal* immigration system, competing with the often more compelling claims of legal immigrants' relatives who wish to join their families in the United States. Congress is also considering whether to eliminate automatic birthright (*jus soli*) citizenship for the U.S.-born children of illegal alien parents. None of these proposals, however, is likely to be enacted. Congress is also taking up the less controversial question of whether the naturalization law should be changed in light of concerns that many immigrants are naturalizing fraudulently, for the wrong motives, or too easily.

As the number of illegal aliens grows, their position in the American polity becomes increasingly anomalous. Americans admire the tenacity, hard work, and resourcefulness of illegal aliens (at least the majority who do not commit crimes in the United States) but at the same time, deeply resent their furtive success in penetrating U.S. territory, working in U.S. jobs, earning (and exporting) dollars, and securing legal status—even the ultimate prize, citizenship—for themselves and their families. As the data on the individuals who voted in favor of California's Proposition 187 illustrated, many legal resident aliens and recently naturalized citizens are also strongly opposed to illegal migration.⁶ The fact that the United States has long countenanced illegal migrants, derived tax revenues and other economic benefits from them, and built important sectors of her economy around their continued flow arouses cognitive dissonance, but it does not really alter the fact of resentment.

The number of illegals residing in the United States now is probably higher than the number whose plight prompted the 1986 legalization. Responding to this reality Congress in late 1997 enacted a new amnesty for approximately 150,000 Nicaraguans and Cubans. It also eased the legalization rules for another 250,000 Guatemalans and Salvadorans, and the Clinton Administration moved to extend relief to more than 15,000 Haitian asylum seekers as well. Americans believe that illegal aliens impose large costs on American society, but even if they did not believe this, they would still

6. Some commentators maintain that the justifications for citizenship lie primarily in the international law realm; this status, they believe, has—or ought to have—little significance inside a nation's borders. See, e.g., Stephen H. Legomsky, *Why Citizenship?*, 35 VA J. INT'L L. 279, 300 (1994).

demand the interdiction and expulsion of illegals. After all, illegals are like trespassers; they have no right to enter or remain. Control of illegal migration, then, is not merely a pragmatic policy goal; it assumes the character of a legal duty and a moral crusade, as evidenced by the far-reaching immigration control legislation enacted in 1996. Americans' conceptions of citizenship reflect these imperatives.

Diminished Autonomy

The massive breaching of American borders by illegal aliens is vivid evidence of the nation's vulnerability; "invasion" and "flood" are the metaphors that are conventionally used to describe the influx. Americans, however, are experiencing a more general sense of unease that their national destiny is moving beyond their control. This anxiety springs from many sources. I have already mentioned growing U.S. reliance on the global economy; American prosperity now depends almost as much on public and private decisions in Tokyo, Bonn, and Hong Kong as it does on those in Washington or Wall Street. But the loss of control is not confined to the economic realm. The protracted trauma of the Vietnam War convinced many Americans that the United States can no longer work its will in the world militarily. The geopolitical fragmentation encouraged by the end of the Cold War has left the United States as the sole remaining superpower, yet the American Goliath is now at the mercy of myriad ethnic rivalries and subnational conflicts that defy international intervention and order. Even threats to public health, traditionally the province of national governments, increasingly cross national borders, as the recent examples of AIDS, dengue fever, tuberculosis, and other communicable diseases suggest. Public concern with international terrorism, galvanized by several notorious bombing incidents, adds to Americans' anxieties about this loss of control.

The world has always been a dangerous place. Most Americans probably believe that it is more dangerous today than ever before, although precisely the opposite is true—at least for them but also for many others. They evidently feel growing insecurity about their jobs, marriages, safety, and personal future. People in such a state of uncertainty naturally search for safe havens from these storms. Their citizenship serves as a dependable anchor; it gives them a secure mooring in an increasingly intrusive, turbulent, uncontrollable "worldwind." A valuable legal status, it can never be taken away. It defines who is a member of the extended political family, which, like its natural counterpart, offers some consolation in a harsh world. We imagine that we can count on the company of citizens to join us in a search for common good. Our concern for our fellow citizens is usually greater than that for the rest of humankind. Fellow citizens share our lifeboat and are in it for the long haul.

Citizenship thus imparts to the polity a special shape and expectancy—in the United States, a common claim to enjoy the "American way of life." The

more perplexing and menacing we find the world and the more buffeting its gales of change, the more tenaciously we cling to our citizenship's value and insist on maintaining it. David Jacobson, drawing on the conceptions of Mircea Eliade and Benedict Anderson, suggests that this tenacity is driven by an even more profound disorientation—a crisis of what Jacobson calls the desacralization of territory. “The nation,” he writes,

is the primordial center, the ultimate point of reference, for its members In being boundary oriented, the (nation)-state depends on those boundaries being effectively maintained. The entry of undocumented or illegal immigrants, or the settlement of guest workers, is not simply a violation of the law of the recipient country. It is a violation of sacred space and of a primordial category.⁷

CITIZENSHIP IN THE DOMESTIC DOMAIN

If citizenship provides succor to Americans in their confrontation with the outside world, it also promises them political and social standing and national identity in the domestic one. Here, citizenship crowns a hierarchy of statuses, with each one bearing a distinctive set of legal rights and obligations.⁸ David Martin has suggested that this domain may be represented metaphorically by concentric circles; a community of citizens at the central core is surrounded by a series of more peripheral status categories, with ever more attenuated ties to the polity, weaker claims on it, and more limited rights against it.⁹ Citizenship's normative meaning can be inferred from (among other things) the magnitude and nature of the gap between the citizens and those in the outer circles with respect to their rights and duties.

American citizenship, as Alexander Bickel famously observed, “is at best a simple idea for a simple government.”¹⁰ By this, Bickel meant that the ratification of the Fourteenth Amendment to the Constitution made membership in the American polity widely and easily available, that the legal rights and duties associated with citizenship have long ceased to be an important or divisive public issue, and that this consensus has been not firm and highly desirable. In an article published in 1989, I found merit in Bickel's point and

7. DAVID JACOBSON, *RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP* 131 (1996). I discuss, and criticize, Jacobson's conception of “post-national citizenship.” (See *infra* page 30).

8. For each status, these rights are more expansive and valuable than the rights of those who occupy the status beneath it. The obligations attaching to these statuses, however, are not calibrated or distributed in quite the same way as rights. The obligations owed by citizens are not necessarily greater than those owed by lesser statuses; in some respects—such as the resident alien's paperwork obligations to the INS—citizen's duties may actually be *less* onerous.

9. See David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165-235 (1983).

10. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 54 (1975).

suggested that it was probably truer then than it had been in 1973 when he first asserted it.¹¹

Today, however, Bickel's (and my) confident assurances seem embarrassingly premature. In a radically altered political environment, the question of citizenship is now both salient and divisive. To understand the larger significance of what has transpired, it is necessary to describe the basic structure of U.S. citizenship law, and the differences between the rights and duties of citizens and those of legal permanent residents (LPRs). I shall then discuss the re-evaluation of citizenship that is now occurring in the United States in the shadow of more fundamental debates—notably, debates concerning the role of immigration in America's future and the legitimacy and shape of the welfare state.

The Structure of U.S. Citizenship Law

United States citizenship can be acquired in three ways. The most common way—citizenship by birth in the United States—reflects the Anglo-American tradition of *jus soli*,¹² a right protected by the Fourteenth Amendment's Citizenship Clause.¹³ Judicial interpretation of the Citizenship Clause has long been understood as extending this status to native-born children of aliens who are in the country, even if present illegally or on a temporary visa. This interpretation has never been seriously questioned in the courts, although it has recently come under scrutiny, and some criticism, from politicians, commentators, and scholars.¹⁴

A second route to citizenship is through naturalization. In 1996, more than one million individuals were naturalized, more than twice the 1995 total, which itself had set a record. To naturalize, an LPR must have resided in the United States with that status for five years, be of good moral character, demonstrate an ability to speak, read, and write English; and demonstrate a basic knowledge of U.S. government and history. More than eighty five

11. See Peter H. Schuck, *Membership in the Liberal Polity: the Devaluation of American Citizenship*, 3 GEO. IMMIG. L. J. I (1989). Much depends, of course, on what one means by "membership" and how full it must be in order to satisfy Bickel's terms. Women, for example, were citizens but lacked the franchise, at least in federal elections, until the ratification of the Nineteenth Amendment in 1920. Young adults only obtained the franchise in 1971 with the adoption of the Twenty-Sixth Amendment. A full, robust citizenship, moreover, demands more than the right to vote. See ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. PUBLIC LAW* (1997); JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* (1991).

12. Although the United Kingdom no longer strongly adheres to *jus soli*, France does. See PATRICK WEIL, *LA FRANCE ET SES ETRANGERS* (1995).

13. Customary exceptions to the *jus soli* rule exist: they include, for example, children born on foreign-flag vessels and children of diplomatic personnel.

14. PETER H. SCHUCK AND ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985). Legislation to eliminate birthright citizenship in these circumstances was considered (but not adopted) in 1996 and the 1996 Republican Party platform called for a constitutional amendment for this purpose. I have opposed such measures under current conditions. See *Hearings Before the Subcomm. on Immigration and Claims and on the Constitution of the House Judiciary Comm.*, 103d Cong. (1995) (statement and letter of Peter H. Schuck); Peter H. Schuck and Rogers M. Smith, Letter to the Editor, N.Y. TIMES, Aug. 11, 1996, at A14.

percent of all naturalizations take place under these general provisions, although some people are permitted to use less restrictive procedures. Spouses of American citizens can naturalize after only three years; children who immigrate with their parents can be naturalized more or less automatically (simply by obtaining a certificate) when their parents naturalize; and adopted children of U.S. citizens can also naturalize in that fashion. Certain aliens who served with the American military during past wars may naturalize easily. Some individual or group naturalizations are effectuated directly by statute. It is significant that a large number of citizenship-eligible aliens choose not to naturalize.¹⁵

The third route to citizenship is through descent from one or more American parents. This principle, known as *jus sanguinis*, is codified in the immigration statute. For example, a child of two citizen parents born outside of the United States is a citizen if one of the parents resided in the United States prior to the child's birth. If one of the parents is an alien but the citizen parent was physically present in the United States or an outlying possession for a period or periods totalling five years, two of which were after the age of fourteen, the child is a citizen. Over time, Congress has liberalized these eligibility requirements, and the Supreme Court is now considering a constitutional challenge to a gender-based distinction in the statute.

Plural citizenships are quite common in the United States due to the combination of the American *jus soli* rule with the various *jus sanguinis* rules of other countries. Thus, aliens who naturalize in the United States must renounce their prior allegiance. This renunciation may or may not effectively terminate the individual's foreign citizenship under the foreign state's law, but U.S. naturalization law—unlike Germany's—does not require that the renunciation actually have that legal effect. As a result of this policy, as well as its policy of allowing U.S. citizens to naturalize elsewhere, the U.S. government tolerates and protects plural citizenships.¹⁶ Since most of the countries of origin from which the largest groups of immigrants to the United States come—Mexico, the Philippines, the Dominican Republic, Canada, and India—recognize children born to their nationals abroad as citizens, plural citizenship among Americans is rapidly increasing.¹⁷

United States citizenship, once acquired, is virtually impossible to lose without the citizen's express consent. Supreme Court decisions since the

15. An INS study of the group of aliens who immigrated to the United States in 1977 found that 54 percent still had not naturalized by the end of 1995, 18 years later, when they had already been eligible for well over a decade. Moreover, most aliens who do naturalize do not apply until well after they become eligible; their median period of U.S. residency is now nine years. There are, however, important regional and country variations in speed of naturalization.

16. See generally Gerald L. Neuman, *Justifying U.S. Naturalization Policies* 35 VA J. INT'L L. 237 (1994); Peter H. Schuck, *Whose Membership Is It Anyway? Comments on Gerald Neuman*, 35 VA J. INT'L L. 321, 326 (1994).

17. Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. (forthcoming Dec. 1997); PETER H. SCHUCK, *CITIZENS, STRANGERS AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* (forthcoming 1998).

1960s have severely restricted the government's power to denationalize a citizen for reasons of disloyalty, divided allegiance, or otherwise. Today, the government cannot prevail against a birthright or *jus sanguinis* citizen unless it can prove that the citizen specifically intended to renounce his or her citizenship. This standard is difficult to satisfy—as it should be. Relatively few denationalization proceedings are brought and the number of successful ones is probably declining. Denaturalization proceedings against citizens who procured citizenship by misrepresenting their backgrounds or through other illegal means are largely directed against Nazi and Soviet persecutors, and under the 1988 Supreme Court decision, *Kungys v. United States*,¹⁸ the standards that the government must satisfy to prevail are quite demanding.

Advantages of Citizenship Status

Until the statutory changes adopted by Congress in 1996, the differences between the legal rights enjoyed by citizens and those enjoyed by LPRs were more political than legal or economic, and those differences had narrowed considerably over time. In the same 1989 article referred to earlier, I argued that the narrowing of these differences constituted a “devaluation” of citizenship, one that raised important questions about the evolving political identity of the United States. Today, partly in response to widespread dissatisfaction with this previous devaluation, a re-evaluation of citizenship is in progress, one in which the differentiation of the rights of citizens and LPRs is a central theme.

The power of Congress to treat citizens and LPRs differently is subject to certain constitutional constraints. United States courts have established that the constitutionality of government-imposed discriminations between citizens and aliens turns in part on whether the discrimination being challenged is imposed by the federal government or by a state. In several Supreme Court decisions during the 1970s, the Court held that Congress could exclude resident aliens from public benefits under Medicare (and presumably under other federal programs as well), but that states could not do so without the federal government's blessing. Since then, the constitutional rationale for decisions restricting the states' power to discriminate may have changed. The Court originally seemed to view state law discrimination on the basis of alienage as a “suspect classification” like race. Under the Equal Protection Clause, the State would be required to show that its interest in discriminating against aliens was “compelling” and narrowly tailored to achieve its purpose, a very difficult burden to satisfy. In subsequent cases, however, the Court relied on a different constitutional theory based on the Supremacy Clause, not the Equal Protection Clause. This latter theory, known as “federal pre-emption,” is discussed below and in the next section, “Citizen-

18. 485 U.S. 759 (1988).

ship in the Federal System,” as are the recent developments in federalism reflected in the 1996 welfare reform law.

Despite these constitutional constraints on discrimination against aliens, some noteworthy differences in legal rights between LPRs and citizens had emerged long before enactment of the 1996 changes, which significantly increased those differences. Three are political in nature: the right to vote, the right to serve on federal and many state juries, and the right to run for certain high elective offices and to be appointed to some high (and not-so-high) appointive offices. Each of these restrictions seems to be premised on one or more of the following assumptions: that aliens’ political socialization is too fragmentary and embryonic to be trusted in matters of public choice; that confining political participation of this kind to citizens carries an important symbolic message about the value and significance of full membership; and that exclusion of aliens from such participation encourages them to naturalize as soon as possible.

Although aliens enjoyed the franchise in various American states during the nineteenth century, only U.S. citizens may exercise it today—a rule that applies in virtually all other countries as well, at least in national elections. A number of local communities have allowed aliens (some even include illegals) to vote in some or all of their local elections, and proposals to extend the franchise to aliens have been advanced in several large cities, including Washington and Los Angeles. In addition, some academic commentators support such a change, drawing on the historical precedent for alien voting and on liberal, republican, and natural rights theories.¹⁹

Most individual LPRs (as distinct from immigrants’ rights advocates) probably do not view the inability to vote as a major disadvantage, although they may well resent the second-class status that this disability implies.²⁰ Immigrants’ collective political identities have emphasized their ethnicities much more than their alienage *per se*; most empowerment campaigns have been mounted by ethnic organizations and promote naturalization, not legal changes to allow aliens to vote. Indeed, in 1996 Congress made it a federal crime for aliens to vote in federal elections, and made voting in violation of any federal, state, or local law grounds for removal. But now that Congress is changing the law to disadvantage legal aliens as a class, the political salience of alienage *per se*, and hence the value that aliens place on the vote, are likely to increase in the future.

Citizenship requirements for jury service are less of an issue in the United States. In the framing of the Bill of Rights, which protected the right to trial

19. See Jamin Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993); Gerald L. Neuman, *We Are the People: Alien Suffrage in German and American Perspective*, 13 MICH J. INT’L L. 259, 291-335 (1992); Gerald Rosberg, *Aliens and Equal Protection: Why not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

20. United States citizens, it should be noted, often do not vote; only forty-nine percent of those eligible to vote in the 1996 presidential election and thirty-eight percent of those eligible to vote in the 1994 congressional elections cast their ballots—a higher rate than in recent off-year elections.

by jury in both criminal and civil cases, jury service was seen as an important political, as well as legal, institution protecting the people from the oppression of governmental and private elites. Prior to the notorious O.J. Simpson trial, Americans esteemed the institution of the jury. Although most serve on it conscientiously, many also view it as less a privilege than a burden. Proposals to permit aliens to vote in local elections emerge periodically, but the notion of extending jury service to aliens has not surfaced in the recent public debate about improving the jury system.

The U.S. policy of barring aliens from federal employment, which is similar to the practice of most nations,²¹ is likely to be a greater concern to aliens than the bar to jury service for most aliens. Few if any LPRs are likely to seek high elective or appointive offices prior to naturalization. Many LPRs, however, might want to pursue employment in the federal, state, and local civil service systems. In two Supreme Court decisions in the mid-1970s, the Court applied the constitutional principles relating to discrimination against aliens in the civil service setting. It held that the Constitution permitted Congress and the President to limit federal civil service jobs to citizens (which has been done since the 1880s) but that the states could not impose citizenship requirements for their own civil service systems. The Court emphasized the exclusive federal interest in regulating immigration, a principle that is discussed more fully below. It recognized, however, the state's power to exclude LPRs from particular job categories that represented the state's "political function," such as schoolteachers and police officers. This distinction, between jobs involving a political function and those that do not, has proved exceedingly difficult to apply but continues to enjoy the Court's support.

Two other disadvantages to LPRs are worth mentioning. First, LPRs have a lesser right to sponsor their family members for immigration. As noted earlier, immediate relatives of citizens receive a preferred immigration status without regard to numerical quotas, and citizens' siblings and adult children have a preferred status under the numerical quota system. In contrast, the spouses and unmarried children of resident aliens qualify for a numerically limited preference, and their siblings receive no preference at all.

Many policy-makers, including members of the U.S. Commission on Immigration Reform, are concerned about the chain migration effects that will be generated by the almost 2.7 million illegal aliens who were legalized under the 1986 amnesty program, are now LPRs and will soon be citizens. This will enable their immediate family members—and in turn *their* family members—to immigrate legally to the United States in large numbers. Congress, under considerable political pressure to reduce legal immigration, could decide to limit LPRs' family immigration rights further, or even to limit

21. For a case dealing with a similar issue in Canada, see *Lavoie v. The Queen* (1995) (upholding Canada's citizenship preference against a constitutional challenge).

the family immigration rights of U.S. citizens who achieved that status only by virtue of the amnesty program enacted in 1986. If enacted such a policy would raise novel and important constitutional questions concerning whether Congress may discriminate among U.S. citizens based on their prior immigration status.

In addition to different sponsorship rights, citizens and LPRs differ with respect to the right to remain in the United States. LPRs are subject to deportation (after the 1996 immigration control legislation, the term is "removal"); citizens (whether by birth, naturalization, or statute) are not. Deportation of a long-term resident can wreak enormous suffering upon aliens and their families and friends. Although the Supreme Court has repeatedly held that removal is not punishment and therefore does not implicate Due Process and other constitutional guarantees that surround the imposition of criminal sanctions, the fact is that, as Justice Douglas once put it, removal "may deprive a man and his family of all that makes life worthwhile."²²

Still, it is important to place this risk in realistic context. The actual risk of removal for non-criminal LPRs living in the United States has been vanishingly small.²³ Even after the 1996 immigration control legislation, formal removal of legal aliens, especially non-criminal LPRs, remains a costly process for the INS to effectuate. Statutes, regulations, and judicial rulings require the INS to observe high standards of procedural fairness in adjudicating whether LPRs may remain in the United States. Severe administrative difficulties further limit the INS's ability to implement even the relatively few formal removal orders and the far more numerous informal departure agreements that it does manage to obtain. Except at the border, where the INS can often effectuate the "voluntary departure" of aliens, the agency has been notoriously ineffective at actually removing aliens who want to remain in the United States—even the "aggravated felons" against whom the Congress has provided special summary enforcement and removal powers.²⁴ As a legal and practical matter, then, a long-term, non-criminal LPR's chances of remaining in the United States if he wishes have been almost as great as those of a citizen. The 1996 law, intended to facilitate the removal of aliens who are inadmissible, commit crimes in the United States,

22. *Harisiades v. Shaughnessy*, 342 U.S. 580, 600 (1951).

23. In 1996 only 54,000 aliens were formally deported or removed "under docket control" and virtually all of these were illegal entrants, out-of-status non-immigrants, violators of narcotics laws, or convicted criminals. The proportion of aliens removed who were charged with crimes or narcotics activity was 66 percent. A far larger number (1.5 million) were expelled without formal proceedings, but almost all of these fell into the same four categories. U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, STATISTICAL YEARBOOK FOR 1996 (1997). Moreover, relatively few of those who were deported or expelled had been in the United States for a long period of time. U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, STATISTICAL YEARBOOK FOR 1993 at 156 (1993).

24. See Peter H. Schuck & John Williams, *Deporting Criminal Aliens: The Pitfalls and Opportunities of Federalism*, 21 HARV. J. L. & PUB. POL'Y (forthcoming 1998). The agency, however, has improved its performance recently. *Id.*

lack credible asylum claims, or are otherwise out of status, is unlikely to increase this risk significantly.

Today the most controversial issue concerning the rights of LPRs concerns their access to public benefits to which citizens are entitled. Prior to the 1996 welfare reforms, LPRs and some other legal aliens who would likely gain LPR status sometime in the future (such as family members of amnestied aliens, refugees and asylum seekers, parolees, and Cuban-Haitian entrants) were eligible for many cash assistance, medical care, food, education, housing, and other social programs, albeit subject to some restrictions.²⁵ In addition, LPRs were often eligible for benefit programs, such as low tuition in state university systems. The 1996 welfare reforms significantly limit the eligibility of LPRs for all or virtually all federal cash assistance programs.²⁶

These legal differences in the United States between the social program benefits that are available to citizens and to LPRs have no parallel in the increasingly beleaguered welfare states of the European Union. In the United States, however, these differences are somewhat palliated by several facts. Some states and cities (New York is a notable example) have been lax and even obstructionist in their enforcement of these limitations. Many LPRs and illegal aliens have managed to circumvent them through fraudulent applications. Most importantly, the vast majority of LPRs can easily escape the limitations on benefits by naturalizing within five years (three if they marry a citizen). Much of the remarkable surge in the naturalization petitions since the 1994 election apparently reflects precisely this kind of calculation on the part of LPRs, who anticipated the kinds of restriction on their entitlements that Congress adopted in 1996.

The Re-Evaluation of Citizenship

In recent years, public discourse about citizenship has returned to first principles: its nature, sources, and significance. So fundamental are these principles that the new discourse amounts to a re-evaluation of American

25. First, so-called 'deeming' provisions apply to many federal and state benefit programs. Even an alien with a visa to enter as an LPR can be excluded if he is "likely at any time to become a public charge," that is, receive means-tested public assistance. An LPR or other alien already in the United States can be removed if he has become a public charge within five years of entry, unless he can show that his poverty was caused by conditions that arose after entry. Very few removals have been enforced under this provision. Entering aliens (except for refugees) must show that they will have a steady source of support through employment, family resources, or otherwise. If they cannot do so, a portion of the income of the entering aliens' U.S. resident sponsors (in the case of family-based immigrants) is deemed to be available to the alien for a number of years after arrival, which will ordinarily render him ineligible for public benefits. An alien who receives welfare would also encounter difficulty in sponsoring other family members as immigrants.

The 1996 welfare reform law extends the reach and enforceability of these deeming provisions, making fewer LPRs eligible for benefits even if they can survive the other new, more categorical restrictions on eligibility for new immigrants and for those already admitted but not yet naturalized citizens.

26. LPRs do enjoy the benefits of a special program, adopted as part of the compromise that led to the 1986 employer sanctions provisions, which bars job discrimination against aliens who are legally authorized to work. The 1996 amendments make proof of discrimination more difficult by requiring the alien to show the employer's discriminatory intent.

citizenship in both its normative and its positive dimensions. This re-evaluation has been prompted by deep concerns about the unity and coherence of the civic culture in the United States, concerns that flow from five developments in the post-1965 era. They are the accumulation of multicultural pressures; the loss of a unifying ideology; technological change; the expansion and consolidation of the welfare state; and the devaluation of citizenship.

Multicultural Pressures

With the enactment of the 1965 immigration law, the composition of the immigration stream to the United States changed radically. Of the top source countries, only the Philippines and India sent large numbers of English-speaking immigrants. Bilingual education thus became a major issue in public education, and teaching in dozens of languages became necessary in many urban school systems. With the growing politicization of ethnicity and widespread attacks on the traditional assimilative ideal, anxieties about linguistic and cultural fragmentation increased. These anxieties have led to public referendums in California and other states establishing English as the official language. Proposals to limit affirmative action and bilingual education have been adopted or are under consideration.

Meanwhile, as genuine racial integration proved elusive, the civil rights movement took a turn towards separatism. Blacks, already severely disadvantaged, were increasingly obliged to cede political and economic influence to more recently arrived Hispanic and Asian voters. Many of the newer groups qualified for affirmative action programs, which exacerbated tensions among the groups and magnified fears that immigration and affirmative action were fragmenting American society. Certain economic sectors came to depend almost entirely upon immigrant workers, legal and illegal. Relatively parochial immigrant enclaves grew larger. These multicultural pressures caused many Americans to feel more and more like strangers in their own country.

Loss of Unifying Ideology

The end of the Cold War deprived the United States of an ideology, anti-communism, that had served for many decades as a unifying, coherent force in American political culture and as an obsessive preoccupation and goal in U.S. foreign policy. No alternative ideology has yet emerged to replace it. Only constitutionalism, our civic religion, seems potentially capable of performing the function of binding together a nation of diverse peoples.

Technological Change

Rapid changes in transportation and communication technologies have transformed a world of sovereign nations into a global web of multinational enterprises and interdependent societies. Migration has become less expensive. Immigrants no longer need to make an irrevocable commitment to their new society; they can more easily retain emotional and other ties to their countries and cultures of origin. On the other hand, there is growing concern that television tends to assimilate second-generation immigrant youths into an underclass culture rather than into the mainstream American culture.

Welfare State Expansion

In the United States, the welfare state—especially the creation of entitlements to income support, food stamps, medical care, and subsidized housing—expanded rapidly during a brief period of time, at least when compared to the more gradual, long-term evolution of European social support systems.²⁷ With this growth, the behavior, values, and economic progress of immigrants became matters of great fiscal significance and public policy concern. In contrast to the historical pattern, immigration no longer ebbed and flowed with the business cycle—presumably because of the growth of the social safety-net. Immigration increasingly pitted citizens and aliens against one another as they competed for scarce public resources. The perennial debate over how the polity should conceive of community, affinity, and mutual obligation took on a new significance as the stakes in the outcome grew larger. Demands that Americans' obsession with legal rights be balanced by an equal concern for their social and civic responsibilities were increasingly heard in the land.²⁸

In August 1996, this long-simmering debate culminated in the radical restructuring of the Aid to Families with Dependent Children (AFDC) program (known and often stigmatized in the United States as "welfare") and some other federally funded cash and social services programs. In the next section, I analyze in some detail the implications of this change for U.S. citizenship in a federal system.

27. Indeed, this growth continued (except in the case of Aid to Families with Dependent Children) during the Reagan and Bush years. See Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553 (1997).

28. Among academics, Lawrence Mead and Mary Ann Glendon were two of the most outspoken advocates for this position. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* (1986).

Devaluation of Citizenship

The egalitarian thrust of the welfare state, its nourishing of entitlement as an ideal, and the repeal of the military draft led to a progressive erosion of citizenship as a distinctive status bearing special privileges and demanding special commitments and obligations. The rights of LPRs converged with those of citizens until there was little to separate them but the franchise, citizens' greater immigration sponsorship privileges, and their eligibility for the federal civil service. Americans began to feel that U.S. citizenship had lost much of its value and that it should somehow count for more.²⁹

These concerns, which have parallels in other countries,³⁰ have prompted calls for a revitalization of citizenship. One type of proposal, which led to the enactment in 1993 of the National Community Service Corps, looks to the creation of a spirit of public service among young people. Another approach, a centerpiece of both the 1988 and 1996 welfare reform, seeks to combat the entitlement mentality by insisting that able-bodied citizens work or get training, and eventually leave welfare altogether.

A third approach, exemplified by the 1996 restrictions on immigrants' access to public benefits, is largely motivated by the desire to save scarce public resources and to favor citizens in the allocation of those resources. Its incidental effect, however, will be to increase the value of citizenship by widening the gap between the rights of citizens and aliens, thereby creating stronger incentives for the latter to naturalize. Whether this incentive is the kind of motivation for naturalization that proponents of a more robust citizenship have in mind is a question that is seldom asked.

Two other types of reform aim directly at citizenship itself. The current INS Commissioner is firmly committed to enhancing the attractiveness of the naturalization process, thereby encouraging more LPRs to acquire citizenship. This effort, however, has been caught up in a congressional investigation of fraud in and partisan manipulation of the naturalization process before the 1996 elections, a review that has already produced administrative reforms and may prompt changes in the naturalization law.

A more radical proposal, not at all inconsistent with encouraging naturalization would deny citizenship to some who would otherwise obtain it automatically. This approach would alter the traditional understanding of the *jus soli* rule, embodied in the Citizenship Clause of the Fourteenth Amendment, under which one becomes a citizen merely by being born in the United States, even if the one's parents are in the country illegally or only as temporary residents. Such proposals which have also been advanced in

29. See Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIG. L. J. 1 (1989).

30. See, e.g., CANADA HOUSE OF COMMONS, CANADIAN CITIZENSHIP: A SENSE OF BELONGING: REPORT OF THE STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION (1994).

Canada,³¹ would eliminate this type of birthright citizenship either by constitutional amendment or by statute.

Advocates of such a change emphasize the importance of mutual consent—the polity's as well as the alien's—in legitimizing American citizenship. They also point to the irrationality of permitting a Mexican woman with no claims on the United States to be able to confer American citizenship on her new child simply by crossing the border and giving birth, perhaps at public expense, in an American hospital. Defenders of birthright citizenship stress the importance of avoiding the creation and perpetuation of an underclass of long-term residents who do not qualify as citizens, a condition similar to that of many guestworkers and their descendants stranded in countries that reject the *jus soli* principle.

Congress is unlikely to eliminate birthright citizenship *per se* although, as noted earlier, political support for this idea has grown recently. Many other nations also apply a birthright citizenship rule. Some others, notably Germany, have been moving towards it, although remaining well short of the American position. Nevertheless, some modification of the traditional birthright citizenship rule might attract wider support in the United States. For example, the law might deny automatic citizenship for those who are born in the United States in illegal status but still enable those native-born illegals who continue to reside here for many years to naturalize at some point. Alternatively, it might reduce somewhat the perverse incentive effects of the current birthright citizenship rule by denying to illegal parents any immigration benefits derived through their birthright citizen children.

CITIZENSHIP IN THE FEDERAL SYSTEM

Among the most striking features of contemporary geopolitics is the fragmentation of national political authority, and its devolution—through the collapse of centralized regimes, civil wars, negotiated agreements, and other decentralizing processes—to smaller, subnational, often ethnically defined groups. This devolution, of course, is still very much in flux. Indeed, as the economic, military, and political disadvantages of radical decentralization become more manifest, some recentralization is bound to occur.

Nevertheless, the rapidity and militancy with which devolution has proceeded are remarkable. This has been most apparent in the former Soviet Union, which fractured in the aftermath of the Cold War. But even before the dissolution of the Soviet Empire, the weaker states of Africa and Asia had been disintegrating into chaos. Devolution is also occurring, albeit more slowly and less dramatically, in older nation-states like Italy, Belgium, and Mexico, and in paradigmatically strong ones like the United Kingdom and

31. See, e.g., *id.* at 17.

France. It is even occurring in nation-states like Canada, which already have highly decentralized federal systems in place.

The United States falls into this last category. Devolution to the states is perhaps the most prominent area of policy innovation pursued by the Republican congressional majority since the 1994 elections. The programs that comprise the modern welfare state are being reassessed and, in some cases, fundamentally reshaped to give the states control of central aspects of the policy process: policy design, financing, eligibility, administration, evaluation, and enforcement. The recasting of the AFDC program is the most dramatic example of a fundamental curtailment of federal power and augmentation of states' authority. Although Congress has not yet overhauled the Medicaid, food stamp, and supplemental security income (SSI) programs as thoroughly as AFDC, the precise division of authority between the federal and state governments remains the subject of bitter struggle and intense negotiations. Devolution of control over social programs, along with deregulation and privatization initiatives in a number of other policy areas, reflects a significant repudiation of the New Deal and Great Society; even the Democratic Party has acceded to it. The nationalizing trajectory of American political development has not merely been interrupted; it has been reversed.

These changes are not merely ephemeral. Instead, they reflect deep and abiding forces in U.S. society³²—and elsewhere in the world. The structures supporting national power will be almost impossible to restore once they are dismantled, for restoration would require three conditions to converge: a convulsive national crisis equivalent to the Great Depression; a renewal of public confidence in the efficacy of centralized power and of national governmental solutions; and a surrender by the states of their hard-won powers. None of these conditions, much less all three, seems likely.

In emphasizing the changing conceptions and roles of national and state citizenship, one must also take note of another institutional development—the private residential enclave—that is becoming an increasingly significant locus of civic membership and governance in the United States.³³ Whether these enclaves take the form of urban apartment condominiums, suburban home-owners' associations, or other co-operative community arrangements, these territorial organizations create new kinds of governance regimes that exercise far-reaching powers over millions of Americans. Although such enclaves are more creatures of private law than public law, and the relationship of people and activities within them are structured more by contracts than by political constitutions, they nevertheless regulate important aspects

32. For a discussion of these social forces, see Peter H. Schuck, *Introduction: Reflections on the Federalism Debate*, 14 YALE L. & POL'Y REV. 1 (1996).

33. For leading and contrasting discussions of this development, see EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* (1994); Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Robert C. Ellickson, *Cities and Homeowners' Associations*, 130 U. PA. L. REV. 1519 (1982).

of their members' lives in ways that closely resemble the powers of government. They too devolve authority—here, from the states, which ordinarily regulate property rights and community development, to private organizations.

These reconfigurations of governance amount to a reconstruction of American citizenship. By redefining the relationships between the citizen and the nation, the citizen and the states, and the citizen and his or her community, these devolutions are fundamentally transforming the rights and duties of membership in the various layers of American politics. In doing so, they are also transforming the meanings that attach to those memberships and those politics.

An important, if relatively unremarked, aspect of this devolution-driven redefinition of citizenship is its possible effect on the status of aliens. The role of the states in defining the rights of aliens in the United States has a somewhat complex history. Until 1875, when the first federal statute restricting immigration was enacted, the states exercised broad authority over aliens' entry and legal rights. Although a Supreme Court decision in 1849 (the *Passenger Cases*) indicated that states could not regulate immigration *per se* but still possessed, a residual constitutional responsibility for protecting the health, safety, and morals of those within their jurisdiction, including aliens. States often exercised their jurisdiction over aliens during this early period in ways that had the effect of limiting immigration, especially by aliens who were poor, ill or otherwise considered undesirable.³⁴

Even after the federal government entered and occupied the field of general immigration control and the Supreme Court invalidated some state laws regulating aliens, states continued to enforce local laws that limited aliens' rights with respect to employment, property ownership, use of public resources, eligibility for public benefits, and other matters. With some exceptions, these statutes were generally upheld by the courts until the 1970s, when the Supreme Court began to apply strict scrutiny to almost all state laws limiting aliens' rights. Relying on the federal government's exclusive, or plenary power, over immigration, the Court went so far as to invalidate even those state law discriminations that tended to reinforce federal policies against illegal aliens by disadvantaging them. In perhaps no other area of legislation has the federal government's primacy been more firmly established and the power of the states more clearly circumscribed.³⁵

The plenary power doctrine is a double-edged sword. It has been criticized by many legal scholars (and I count myself among them) who find no textual

34. See, e.g., Peter Skerry, *Many Borders to Cross: Is Immigration the Exclusive Responsibility of the Federal Government*, 25 *PUBLICUS* 71 (1995); Gerald Neuman, *The Lost Century of American Immigration Law*, 93 *COLUM. L. REV.* 1833 (1993).

35. If anything, the courts, led by the Supreme Court, have reaffirmed this primacy in the last decade. For a review of some of the recent cases, see Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 *HASTINGS CONST. L.Q.* 925 (1995).

warrant for it in the Constitution and who contend that the structural and policy justifications that have been used to support it, such as the need for a single voice in foreign affairs, are either weak or over-broad.³⁶ These scholars believe that the federal government's power over aliens, while broad, must be subject to some constitutional limitations. At the same time, these scholars have generally applauded the courts' reliance on the plenary power doctrine's federal pre-emption logic when used to constrain the states to regulate and discriminate against aliens. Deepening this tension is the fact that differences between citizens and aliens make the main alternative doctrinal constraint on state alienage discrimination—heightened scrutiny under the Equal Protection Clause—difficult to apply.

The question, then, is how fair treatment of aliens can be assured in a federal system in which the national government possesses plenary, or at least primary, responsibility for regulating aliens while the states, which sometimes have fiscal and political incentives to discriminate against them, possess some degree of policy autonomy, especially in a devolutionary era.

Today, however, this old question has taken on a new coloration. The United States has entered a period of extraordinary constitutional ferment in which the federal government's constitutional authority—even over subjects as to which it has long played the exclusive or dominant policy-making role—is being increasingly challenged. The most dramatic example of this ferment occurred in the Supreme Court's *United States v. Lopez*³⁷ decision, rendered in 1995. In *Lopez*, a sharply divided Court invalidated a federal statute that prohibited the possession of firearms near schools. It did so on the ground that the federal power to regulate under the Commerce Clause of the Constitution did not extend to such a local activity. Although the decision's scope and significance remain unclear, it cast doubt on almost sixty years of jurisprudence that construed the Commerce Clause to permit virtually any regulation that Congress wished to enact. *Lopez* has already provoked new challenges to long-established laws in policy areas involving highly localized impacts—for example, environmental regulation, drug enforcement, and abortion—which had previously been considered well within the ambit of federal power.

Federal regulation of immigration, of course, would survive a constitutional challenge under *Lopez*. As noted above, more than a century of Supreme Court decisions have emphasized the national sovereignty and foreign policy implications of immigration law, the exclusive federal prerogatives in this area, and the dangers of state encroachment. This traditional approach remains essentially sound, and it is difficult to imagine that the Court, ironically radical as some of its law conservatism is, would jettison it.

36. See, e.g., Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA J. INT'L L. 121 (1994); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14-30 (1984); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255.

37. 117 S.Ct. 38 (1996).

It is not the Constitution, however, that has restricted state responsibility in the immigration field. In a series of decisions invalidating state laws on federal pre-emption grounds, the Court has clearly indicated that Congress remains free as a matter of *policy* to authorize, or perhaps even require, the states to act in this area. The real impediment to a greater state role is Congress, which has long chosen to occupy the field of immigration policy through federal legislation. In recent years, Congress has prescribed only a very limited role for the states in immigration policy—to provide federally mandated social services for refugees. The recent federal court decision invalidating most of California's Proposition 187 on pre-emption grounds is only the most recent example of the limits placed on state policy discretion when it conflicts with federal policy, the state targets illegal aliens.³⁸

This situation, however, could change. Nothing in the nature of immigration policy requires that it be an exclusively national responsibility. Although immigration control is a national function in all countries, subnational units in some federal systems—Canada and Germany, for example—do exercise important policy-making functions with respect to immigration. With devolution occurring in so many other areas of public policy traditionally controlled at the center, can immigration regulation remain impervious to the trend? And if the states were to assume a more significant, independent role in immigration policy, a role that Congress might encourage and that the courts might therefore sustain, how would this development alter the nature of citizenship in the American polities?

These questions are by no means academic. Some of the same economic, social, political, and ideological forces that are propelling devolution in other policy areas also affect immigration politics. Immigrants are not distributed randomly across the nation. Quite the contrary; immigration is a largely *regional* phenomenon, with the vast majority of immigrants tending to live in a handful of states and metropolitan areas. However great the economic and other benefits of immigration to the nation as a whole may be, its costs—especially those resulting from immigrants' use of schools, hospitals, prisons, and other public services—are highly concentrated in these few high-impact states and metropolitan areas, while the rest of the country need not incur immigration's costs in order to enjoy many of its benefits. For proposals like Proposition 187 have been prompted by frustration with the costs of services demanded by large immigrant concentrations. For these high-impact states, immigration is as salient as any policy area with which they deal.

That these state-level impacts also have enormous *political* significance is obvious when one considers, as politicians surely do, that the seven states

38. See *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995). In November 1997, the 1996 federal district court reaffirmed its decision despite the intervening enactment of the welfare reform statute requiring states to discriminate against illegal aliens in the administration of certain social programs.

with the largest immigrant populations account for two-thirds of the electoral votes needed to win the presidency.³⁹ This fact places immigration reform high on the *national* political agenda—and it is from the national level, principally from Congress, that devolution of power over immigration policy must ultimately issue. Signs of movement in this direction appeared in the 1995 federal law limiting unfunded national mandates on states and localities, and in the 1996 welfare reform legislation discussed earlier. One of the practices prompting the unfunded mandates law was the federal government's recent policy of admitting a growing number of refugees while at the same time reducing its funding for resettlement support, thus forcing states, localities, and non-governmental organizations to pick up the tab for the increasing deficit.⁴⁰ The 1996 welfare reform law restricts federal policy initiative even further, transmuting AFDC into block grants and leaving the states largely free to determine how to distribute those funds among U.S. citizens while barring the states from spending them on certain alien categories. State laws that impose restrictions on state-financed programs consistent with the new federal restrictions will almost certainly survive constitutional challenge in the courts.

In a recent article, Professor Peter Spiro develops a more sweeping rationale for the devolution of immigration policy to the states.⁴¹ He argues that the interests in national uniformity and control over foreign relations, which constitute the traditional justifications for federal pre-emption in immigration policy, are no longer decisive in a “post-national world order.” In that order, according to Spiro, states are the major fiscal and political stakeholders in immigration policy. They also play larger, more independent roles in their dealings with foreign nations. He attributes the more robust state role in foreign relations to the globalization of information, communications, and travel, and to the economic and cultural ties that states have increasingly forged with foreign governments and communities. “This international engagement on the states’ part,” Spiro writes, “has inevitably undermined the [traditional pre-emption] doctrine’s more fundamental underpinning, viz., that other countries will not distinguish the states and their actions from the nation’s.”⁴²

Spiro’s argument is less important for his prescriptions, which I find quite problematic, than for his empirical claim that the federal government’s monopoly of authority and influence in foreign relations and immigration is steadily (and, in his view, irrevocably) eroding, as the states and private non-governmental organizations operate more independently of Washing-

39. See Peter Skerry, *Many Borders to Cross: Is Immigration the Exclusive Responsibility of the Federal Government*, 25 *PUBLIUS* 84 (1995).

40. See *id.* at 78-79.

41. See Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 *VA J. INT’L L.* 121 (1994).

42. *Id.* at 162.

ton.⁴³ Assuming that he is correct about this, however, it does not follow that Congress will devolve authority over immigration policy to the states—even if it continues to do so in other policy domains. Congress may instead conclude that immigration is simply *different*, perhaps because, it believes, contrary to Spiro that immigration's foreign policy implications and the need to speak with one voice are considerations of overriding importance.

Alternatively, Congress might adopt a middle path. Congress might decide that *as a matter of national policy*, it is prepared to tolerate greater diversity among states in their treatment of aliens. By adopting an affirmative national policy that allows states to discriminate against aliens in certain areas such as welfare benefits or student loans, Congress could continue to uphold the principle of federal pre-emption while encouraging policy diversity among the states. Such a national policy might well pass constitutional muster as an exercise of Congress's plenary federal power. If so, the courts might then uphold—as consistent with and in furtherance of this federal plenary power—discriminatory state laws that would otherwise raise serious constitutional questions. They might distinguish *Graham v. Richardson*⁴⁴ and its progeny on the ground that the discriminations invalidated in those decisions were not authorized by this kind of clearly expressed congressional policy.

In the welfare reform legislation enacted in August 1996, Congress took precisely this middle path on the question of aliens' eligibility for welfare and other public benefit programs. The legislation is very complex. It creates a new legal category ("qualified aliens"); differentiates among particular programs, governmental levels, and alien categories; carves out many exceptions; contains "grandfather" clauses; and provides special transitional rules. Consequently, its specific meanings will remain uncertain for years to come. But, what is of greater interest for present purposes is this: *Congress sought to "revalue" U.S. citizenship by adopting a firm national policy favoring discrimination against LPRs (not just illegal aliens) in the distribution of public benefits and by conscripting the states in the implementation of that new policy.*

In the 1996 law, Congress defined four different policy modalities along a spectrum running from prescription to complete deference. Interestingly, these modalities do not simply track the distinction between federal and state programs (although that distinction is obviously at work in the chosen level of prescription). Moreover, Congress is somewhat prescriptive even where it is deferential.

The first modality, which deals with federal benefits (defined broadly) and is highly prescriptive, precludes any contrary state policies. It bars aliens other than LPRs, refugees and asylum-seekers, and a few other categories of

43. This development is not confined to the United States but is occurring in other developed nations as well.

44. 403 U.S. 365 (1971).

immigrants from access to all federal benefits. The law also bars all *current* LPRs and other aliens with legal status, except for three favored groups,⁴⁵ from the fully federal SSI and food stamp programs.⁴⁶ Finally, it bars *new* LPRs and other legal aliens (other than those three groups) during their first five years in the United States from all federal means-tested programs such as AFDC and its successor. The law also contains a large number of exceptions including emergency Medicaid, disaster relief, child nutrition, some training and education.

In its second modality, Congress is more deferential to the states' policies toward aliens—even relating to some federal programs. It *allows*, but does not require, states to bar aliens from three federal programs including: the block grants for temporary assistance for needy families, social services block grants, and non-emergency Medicaid. In contrast, Congress *requires* states to provide these benefits—which in the case of Medicaid benefits are very costly—to the three favored alien groups.

In its third modality, Congress adopts a prescriptive mode regarding most *state and local* benefit programs. States are prohibited from allowing any aliens other than LPRs, temporary visitors, and some other categories to receive state and local public benefits, except for certain emergency programs. States are allowed however, to make *illegal* aliens eligible for those state and local benefit programs, but only if they do so by new, specific legislation. Oddly, this empowers states to place illegal aliens in a better position than certain categories of legal aliens to whom, under the new law, the state may not provide state and local benefits. A fourth modality—deference to state programs—*allows* states to bar legal aliens, other than the three favored groups, from state programs altogether.

This crazy-quilt pattern is not accidental; it is emblematic of the complexity of U.S. policies, federal structure, and public administration. From the perspective of the polity's valuation of citizenship, however, two aspects of the new law's treatment of aliens are particularly striking. First, the federal government has now made a clear, comprehensive policy choice, albeit one confusing in its details, in favor of a national policy to discriminate against aliens in its federal programs, and to either require or permit the states to do so in their programs. This policy fundamentally reverses the recent law in this area. With a few exceptions, such as the wholly federal program at issue in *Mathews v. Diaz*⁴⁷, the federal government had largely abandoned the practice of discriminating against aliens and, because Supreme Court deci-

45. The favored groups are: refugees and asylum-seekers in their first five years in the United States, veterans and soldiers, and those who have worked in the United States for ten years and stayed off public assistance during that time.

46. As part of the budget compromise negotiated by President Clinton and Congress in July 1997, some of the SSI benefits, accounting for nearly half of the other cuts, were restored to legal immigrants who were receiving benefits on or before August 22, 1996.

47. 426 U.S. 67 (1976).

sions held the states to the same rules as a matter of constitutional law, the states could not discriminate either.

New York City, Florida, and other plaintiffs immediately challenged the new federal policy on equal protection grounds. A federal district court in New York, however, has upheld the statute as being rationally related to the federal government's interests in controlling program costs, encouraging aliens to naturalize and to be self-sufficient, and removing an incentive for immigration.⁴⁸

The second noteworthy feature of this new federal mandate to discriminate is that it is part of a statute that vastly enlarges the states' discretion over most other aspects of welfare policy. This means that the new policy on alien benefits is unusual not only substantively, in that it requires discrimination that in other contexts would be unconstitutional, but also structurally, in that it presumes, contrary to the now-dominant thinking about federalism, that Washington knows best and should enforce its "one-size-fits-all" policy preferences on the states.

In general, however, the rights and obligations of individuals—U.S. citizens and aliens alike—will now depend more on state law and less on federal law than at any time since the New Deal. To the extent that Congress devolves immigration policy to the states, *state* citizenship could become more salient than in the past, and the constitutional limits on states' power to discriminate—constraints derived from state constitutions as well as from the U.S. Constitution—will become more significant. State citizenship is a status that has received little scholarly attention of late; it ceased to have much practical significance once states barred aliens from voting in their elections, American Indians received U.S. citizenship, and the Supreme Court interpreted the Constitution's Privileges and Immunities Clause to limit the states' power to discriminate against citizens of other states.

This might change if Congress expressly permitted the states to favor their own state citizens over aliens in areas other than those public benefits covered by the 1996 welfare reform law. The plenary power doctrine might then preclude aliens from challenging Congress's decision to do so under the U.S. Constitution; in that event, aliens' only recourse might be to challenge the state law discrimination under the applicable state constitution. State constitutions typically contain equal protection clauses, and those clauses proscribe many kinds of discrimination—in some cases more completely than the federal Constitution does. But the extent to which state constitutions would limit alienage discrimination would be unclear, particularly where the constitutional issues arise in a novel context in which states exercise new powers and operate outside the shadow cast by traditional federal pre-emption principles— or indeed operate consistently with federal policies favoring discrimination against aliens.

48. See, e.g., *Abreu v. Callahan*, 971 F. Supp. 799 (S.D.N.Y. 1997).

If devolution thus transforms the structure of American federalism, the nature of citizenship in the American polities must also be transformed. The legal, political, and social relationships between an individual alien and the larger juridical communities that affect her relative status and well-being—the national government, state governments, and local self-governing enclaves—will in effect be redefined.

Like so much else in this new devolutionary regime, it is difficult to predict how aliens will fare under it. Some aliens will be better off than they are now, while others will be worse off. Some states and local communities already embrace legal aliens at least as warmly as the federal government does. In such states, this favorable reception is driven by enduring forces; it will probably continue even after the 1996 changes in the welfare and immigration laws are fully implemented. There, aliens are regarded as valuable economic and cultural assets, and politicians anticipate that immigrants may soon become citizens and voters and these politicians may seek support from already established ethnic communities concerned about the newcomers' welfare. State governments in Texas and New Jersey, for example, seem to view legal immigrants as beneficial to their states.⁴⁹ Even Pete Wilson, the California governor who promoted Proposition 187, has defended the welfare benefit rights of legal aliens, extending their entitlements under federally funded programs as long as possible. State and city politicians in New York and Massachusetts have welcomed even illegal aliens.⁵⁰

Other states and communities, however, may view at least certain types of immigrants as unwanted invaders, as fiscal and political burdens that the state can hope to shift to other states. The possibility of a so-called "race to the bottom," in which states seek to discourage some categories of immigration by adopting more discriminatory policies than sister states, is a powerful argument in favor of pre-empting state immigration policies in a federal system or at least for imposing limits on permissible state discrimination.⁵¹ It is a possibility, moreover, which the 1996 welfare reform magnifies. The experience of other federal nations in dealing with this risk of immigration policy fragmentation should be of special interest to the United States in this devolutionary era.

49. See KEYS TO SUCCESSFUL IMMIGRATION: IMPLICATIONS OF THE NEW JERSEY EXPERIENCE (Thomas J. Espenshade, ed., 1997); Scott McCartney and Karen Blumenthal, *Texas Strives to Avoid California's Mistakes, and It Is Prospering*, WALL ST. J., Sept. 13, 1995, at A1.

50. See, e.g., Eric Schmitt, *Giuliani Criticizes G.O.P. and Dole on Immigration*, N.Y. TIMES, June 7, 1996, at B3. Some of the states mentioned (as well as others) have sued the federal government to recover billions of dollars that states have expended to educate, incarcerate, and hospitalize illegal aliens. All such suits have been dismissed and appeals are pending.

51. A similar analysis has been applied, *mutatis mutandis*, to many other areas of public policy in the United States. See, e.g., ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993); SYMPOSIUM ISSUE ON FEDERATION, YALE L. & POL'Y REV. (1996); Daniel Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1995).

A Brief Note on "Post-National Citizenship"

In recent years a number of scholars have pointed to a new development in thinking about citizenship—what Yasemin Soysal and others have called the idea of “post-national citizenship.” Its “main thrust,” according to Soysal, “is that individual rights, historically defined on the basis of nationality, are increasingly codified into a different scheme that emphasizes universal personhood.”⁵² In this conception, transnational diasporic communities of individuals bearing multiple, collective identities make, and, ideally, enforce claims against states. In contrast to a traditional “national” model of citizenship, individuals—simply by virtue of their personhood—can legitimately assert claims on the basis of their universal human rights (as devolved by evolving principles of international law) whether or not they are citizens, or even residents, of those states.

In somewhat similar terms, David Jacobson notes the emergence of a “deterritorialized identity” that is transforming the nature of, and relationships among, the community, polity, and state, and he cites some judicial decisions that seem to be propelling this transformation. A new dispensation, Jacobson believes, is inevitable:

The multiplicity of ethnic groups and the absence of contiguity of such groups make any notion of territorially based self-determination patently impossible. However, in so far as such groups can make claims on states on the basis of international human rights law and, hence, become recognized actors in the international arena, territoriality becomes less critical to self determination.⁵³

Jacobson quickly adds that this bright promise of post-national citizenship is being realized only in western Europe and North America, acknowledging that eastern Europe is experiencing the very opposite: “the territorialization of communal identity.”⁵⁴

These visions of post-national citizenship are undeniably attractive. A just state will respect and vindicate minority groups’ claims to cultural diversity and autonomy. Detaching the legitimacy of these claims from their conventional territorial moorings in “normal politics”⁵⁵ and traditional citizenship law, as post-national citizenship seeks to do, may sometimes promote their recognition. Indeed, Soysal’s own work on the progress of Muslim communi-

52. YASEMIN SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* 136 (1994). Soysal notes that the idea of post-national citizenship has developed since the Second World War and especially during the last two decades. *Id.*

53. DAVID JACOBSON, *RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP* 126-27 (1996).

54. *Id.*

55. I have borrowed this phrase and its connotation from Bruce Ackerman. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L. J.* 1013-72 (1983).

ties in western Europe suggests this outcome.⁵⁶ Some court decisions, which have required polities to extend procedural and even substantive rights to strangers who come within their jurisdiction and claim judicial protection, also seem to point in this direction.⁵⁷

Those decisions, however, remain exceptional and some have been overturned in the United States by the 1996 immigration and welfare reform laws. But a more important set of questions about the character and implications of post-national citizenship are raised by recent events elsewhere in the world. Bosnia, Somalia, Rwanda, Burundi, Cambodia, and all too many other areas of conflict should remind us that the ostensible goals of post-national citizenship—human rights, cultural autonomy, and full participation in a rich civil society—are tragically elusive, and that its achievements are extremely fragile.

The problem is not merely that partisans of exclusion and discrimination will oppose post-national citizenship at every turn and often succeed in establishing illiberal policies in traditional nation-states. The more fundamental problem is that post-national citizenship ultimately depends on its ability to transcend, or at least enlarge, the domains of normal politics and law. After all, if those domains would accept the post-national agenda, there would be no need to advocate it as an alternative to traditional national citizenship and hence no problem. Such a transcendence of normal politics, however, would leave post-national human rights naked and vulnerable with no firm political and institutional grounding. Without such a grounding, national courts enforcing international law principles are unlikely to provide durable, reliable protection.⁵⁸ The often feckless international human rights tribunals are even less plausible guarantors of those principles.

Soysal and Jacobson might acknowledge this point yet respond that some protection for post-national citizenship, however episodic, is better than none. But this response does little to shore up post-national citizenship, for its grounding only in adjudication would risk more than an incomplete fulfillment. The problem is not simply that courts are institutionally ill-equipped to

56. See YASEMIN SOYSAL, CHANGING PARAMETERS OF CITIZENSHIP AND CLAIMS MAKING: ORGANIZED ISLAM IN EUROPEAN PUBLIC SPHERES, Working Paper No. EUF 1996/4 (1996) [hereinafter *SOYSAL, CHANGING*].

57. I developed this theme almost fifteen years ago in an article that called attention to these judicial stirrings. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14-30 (1984). Jacobson has also discussed some of these themes. DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP 131 (1996). In hindsight, I believe my conclusion that a "transformation" was occurring may have been somewhat premature, although important changes in judicial doctrine and attitude clearly did occur during the 1980s.

58. See Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L. J. 1763 (1993). The swift overruling and narrowing of most of the "post-national" U.S. court decisions on behalf of long-detained criminal aliens that Jacobson cites confirms this point. *Id.* And while *Plyler v. Doe*, 457 U.S. 202 (1982), probably the most important "post-national" decision cited by him, remains intact, both its narrow majority and its reasoning leave it vulnerable to being either reversed or distinguished away, perhaps in the pending litigation challenging the constitutionality of Proposition 187. See Peter H. Schuck, *The Message of 187*, AM. PROSPECT 85-92 (1995).

defend their rulings in the political arena, or even, as Mr. Dooley famously put it, that the Supreme Court follows the election returns.⁵⁹ The greater risk is that the normative foundation of a post-national citizenship may be so thin and shallow that it can easily be swept away by the tides of tribalism or nationalism. As formulated by Soysal in her work on civil society, post-national citizenship, unless it includes rights already established under national laws, possesses only a limited institutional status, largely confined to some courts. Of course, if it were more fully institutionalized than this, the new ideal would be superfluous. Beyond this, Soysal argues, post-national citizenship is built on a "discourse of rights," one that explicitly renounces the Habermasian effort to fuse reason and will in pursuit of a non-coercive consensus. Instead, this discourse chooses "to focus on agendas of contestation and provide space for strategic action, rather than consensus building."⁶⁰

I am not at all certain what this means, but it strikes me as ominous. I worry when normative commitments on which the lives and welfare of vulnerable minorities depend is premised on something as insubstantial, transitory, and manipulable as a "discourse," even a discourse of rights. Discourses of rights are double-edged swords, and my metaphor is grimly apt. The slain in the former Yugoslavia call out an unmistakable warning from their mass graves. Their murderers, after all, were and are participants in a discourse of rights. They too are transnational communities which plausibly invoke universal human rights to legitimize their claims to group autonomy, cultural integrity, and political self-determination. They too believe that these rights are threatened by other communities, even as those other communities, with tragic irony, claim similar rights and perceive similar threats. In this furious competition for communal power, the discourse of rights—universal in form but fatally tribalistic in practice—has legitimized genocidal holocausts. This discourse has been far more destructive of human life, property, and values than all of the well-known limitations of normal politics in democratic polities.

In reasonably democratic states—and post-national citizenship is only possible and meaningful in such states—even an imperfect constitution recognizing minority rights, and even a majoritarian politics in which groups must compete for acceptance of their communal aspirations, are likely to provide more certain guarantees of liberal human rights than a discursive ideal. This is especially true to the extent that the post-national, trans-national ideal is institutionally grounded only in politically isolated courts and lends itself, because of its substantive indeterminacy, to repressive applications. A

59. See PETER FINLEY DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

60. See SOYSAL, CHANGING, *supra* note 56, at 16. Although Soysal does not expressly refer here to the idea of post-national citizenship developed in her other work, she is clearly invoking it, as when she concludes: "[t]his shift in focus from national collectivity to particularistic identities . . . points to the emergence of a new basis for participation and the proliferation of forms of mobilization at various levels of polity, which are not imperatively defined by national parameters and delimited by national borders." *Id.*

discourse whose success requires overcoming the messy exigencies of normal politics where expansive conceptions of human rights must contend for legal recognition seems destined to be either irrelevant or anti-democratic.

There is, however, a valuable role that the notion of post-national citizenship can and should fulfill. It should serve as a compelling vision of tolerance, diversity, and integration that people of good will can aspire to, that normal politics in democratic states can sometimes realize, and against which their failures can be fairly judged and condemned. This is the role that it has begun to play in the United States. To claim more for it, or to promote it as an alternative to, or as a cure for, the weaknesses of democratic politics, would ultimately discredit the humane agenda that its proponents advocate. If it can succeed in mobilizing normal politics to win that recognition in positive law, however, it will be truly transformative even as it thereby ceases, in an important sense, to be "post national."

CONCLUSION

Citizenship is a status whose meaning in any particular society depends entirely on the political commitments and understandings to which its members subscribe. In the United States, many of these commitments and understandings have always been tenuous, contestable, and contested; and some still are.⁶¹ Of no political arrangement is this more true than the American welfare state. It was first established only sixty years ago and it only reached its current form in the 1970s and 1980s, with the rapid expansion of the food stamp, Medicaid, and social security programs.⁶² In this mature form,⁶³ then, the welfare state is less than three decades old. During most of this period, moreover, its legitimacy has been under constant attack by much of the political and intellectual establishment; the present political struggle will determine precisely how firm its hold on the public's allegiance actually is.⁶⁴

This feverish debate over the welfare state, which has continued and in some ways deepened since its inception in the New Deal era, has inevitably shaped Americans' conception of the meaning and incidents of citizenship. In this sense, the American debate might be seen as yet another example of what has tendentiously been called "American exceptionalism"—the notion that, for a variety of complex historical reasons, some of the patterns that have

61. For a magisterial account of these contests, see ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. PUBLIC LAW* (1997).

62. Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 *YALE L. & POL'Y REV.* 553 (1997).

63. Even in this mature form, most European (and American) analysts consider it a limited, laggard example of the species.

64. The most recent evidence bearing on this question is the decision to create a large new federal program to provide health care coverage to children who are uninsured. Adam Clymer, *Whitehouse and the G.O.P. Announce Deal to Balance Budget and Trim Taxes*, *N.Y. TIMES*, July 29, 1997, at A1.

shaped the character of European democracies do not apply, or apply quite differently, to the United States. In this case, however, I believe that such a perception would be mistaken. More likely, the American debate prefigures a re-evaluation of citizenship in Europe.

Such a re-evaluation appears to be inescapable in light of a number of extremely important developments: the enlarged scope and ambition of the European Union; the migration and asylum pressures unleashed by the fall of the Iron Curtain; the social tensions created by large, unassimilated alien populations with limited access to citizenship; the recognition among many European leaders that recent budget deficits are both unsustainable and inconsistent with further monetary and political integration; and the sclerotic performance in recent years of the high-cost European economies in the intensely competitive global markets. Although this debate may resemble the American one in some respects, it will be distinctively European in many others. As the social, economic, and political conditions of Europe and the United States increasingly converge, we shall have unprecedented opportunities to learn from one another—from our triumphs as well as our mistakes.